benefits from billed party preference, even assuming it were available for all calls. In most jurisdictions, even those consumers who are unwilling to dial access codes can reach a particular carrier by dialing "0" and asking a live operator to transfer the call to a particular carrier. The mechanism to accomplish this -- operator transfer service -- is already in place.

D. The Cost of Billed Party Preference Cannot Be Effectively Controlled

The Commission's Notice requests information about the costs of billed party preference. AT&T has estimated a cost of about thirty-two cents per call. Given the likelihood of unforeseen expenses in any project of the magnitude of billed party preference, this estimate should be considered very conservative.

In addition, any assessment of costs must consider more than just the direct costs of the system. As a result of the enactment of TOCSIA, the payphone and operator services industries have devoted a great deal of effort to implementing TOCSIA's access code dialing requirements. TOCSIA specifically required payphone owners and other aggregators to "unblock" 800 and 950 access codes, and to post information informing consumers of their right to use access codes to reach their preferred OSP. In addition, the Commission only recently completed a rulemaking in which it determined that payphone owners and other aggregators must "unblock" the 10XXX access code as well. Compliance with this requirement is requiring a very substantial investment by the industry. Further, TOCSIA itself already has required equipment manufacturers (both payphone and PBX and key system manufacturers) to modify their equipment designs -- also at considerable cost -- to offer the capability to selectively allow 10XXX access code dialing.

Regulators, of course, also have devoted major resources, using funds provided by taxpayers, to ensuring that the requirements of TOCSIA are implemented. In addition to the major efforts expended by the FCC, there have been considerable resources expended at the state level to implement rules governing access code dialing. Many state regulators have developed parallel regulations requiring that access code dialing be available for the purpose of making intrastate calls.

All the funds invested in these efforts would be largely wasted if the Commission were now to decide that a completely different system for consumers' access to their preferred OSPs must now be imposed on the entire industry.

Beyond these costs, it is also necessary to consider all the funds invested in businesses that will not survive the marketplace havoc caused by compulsory billed party preference. <u>See</u> Section III, below.

Moreover, actual direct and indirect costs incurred are only part of the equation. The Commission almost must consider how much the LECs will charge for the service. The <u>Notice</u> states that "it would appear that billed party preference would qualify as a 'new' service under LEC price caps." Notice, n. 30. New services, of course, are not "under" price caps at all for a period of at least a year, and the rates for new services are subject only to "flexible cost-based" regulation.[11] Whatever the actual costs, it is clear that the LECs will be motivated to set the initial rates for billed party preference as high as possible, in order to take maximum advantage of the temporary exclusion of billed party preference from price caps.

Interexchange carriers will have no choice but to subscribe to billed party preference at whatever rates are charged, since they otherwise would not receive any 0+ traffic. Moreover, interexchange carriers will have no means of passing on the charges they incur for the billed-party-preference solely to those consumers who dial 0+. As the comments filed in these proceedings regarding the CIID card issues make clear, interexchange carriers cannot distinguish between 0+ and 10XXX calls that reach their networks. Therefore, IXCs that offer 10XXX access will not be able to surcharge 0+ callers alone for the billed-party-preference costs caused by 0+ callers alone.[12] Therefore, there will be no means of recovering the costs of billed party preference from the "cost

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[11] See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4531 (1991).

[12] This may be a problem for other access code calls as well.

causers,"[13] and no effective market check on the rates for billed party preference. Under the existing system, it is possible for a consumer to dial access codes in order to avoid any excessive charges imposed by a particular operator service provider. Under billed party preference, however, the high costs of the system are automatically imposed on all 0+ callers, and there is no way to avoid them by dialing 10XXX access codes. The costs cannot be assigned to the cost causer. Therefore, billed party preference provides no user incentive to use such access codes.

Given the absence of an effective market check, and the LECs' incentive to price billed party preference as high as possible in anticipation of price cap regulation, there is reason to believe that the rates charged by LECs for billed party preference will be in the range of fifty cents to one dollar per call or even more. These rates, of course, would not cover all the costs imposed by billed party preference: they would not cover, for example, all the "stranded investment" of industry competitors in equipment and facilities that can no longer be used. See Section III. However, even assuming that only the charges assessed for the service itself are to be considered, the question must be asked whether the marginal benefits of billed party preference are worth \$0.50 to \$1.00 or more per call. Since the proponents of billed party preference are proposing to compel its adoption without any

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[13]This is yet another inconsistency between billed party preference and the settled policies established by the Commission. See Section I.

marketplace test, the proponents have the burden of showing that the benefits of the system are worth the costs it will impose. There is no evidence that consumers are willing to pay 50 cents to $1.00 or even more per call to save the few seconds it takes to dial a five- or ten-digit access code.

In summary, the alleged benefits of billed party preference are, at best, highly speculative, and at worst, illusory. The Notice cites no record evidence indicating that consumers would be willing to accept the massive costs of the sytem in return for such benefits, however defined. Accordingly, even without considering the impact on competition, it is clear that the benefits to be gained cannot justify a policy shift of the magnitude of billed party preference.

III. BILLED PARTY PREFERENCE IS ANTICOMPETITIVE

Compulsory billed party preference would virtually eliminate the existing competitors, other than the "big three" interexchange carriers, in the operator services market, and would, at best, stultify the development of effective competition in the payphone market. There is no basis for taking a step that would cause such extensive harm to emerging competitive markets and the companies that serve them.[14]

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[14] In addition to its impact on competition, compulsory billed party preference would impose massive costs on the industry, in the form of, e.g., (1) wasted investment in conversion of equipment and fraud protection measures in connection with 10XXX dialing, and (2) wasted investment in the hundreds of companies that will go out of business because they cannot compete in a (continued...)

A. Payphone Competition Would Be Crippled

With respect to payphones, available data indicate that competition has spurred substantial growth in the number of payphones installed. Under competition, underserved areas such as inner cities where there were no payphones, or where payphones were poorly maintained, are being served. Competition provides an incentive for payphone providers to maximize usage by making sure that payphones are easily accessible, attractively designed and properly maintained. Imposing a system of billed party preference would reverse the growth of this dynamic competitive industry. It would take away much of the aggregator's incentive to assemble a competitive package of payphone equipment and services, and would thereby eliminate much of the stimulus that has fostered the increase in the quantity and quality of payphone installations. In addition, compulsory billed party preference would foster remonopolization of the payphone market by the LECs. Even if independent payphone providers were not completely eliminated, the anticompetitive conditions they face would be greatly aggravated by interposing yet another "bottleneck" controlled by their largest competitors, the LECs.

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[14](...continued) payphone and operator services marketplace governed by billed party preference.

Despite these indisputable destructive effects, the Notice suggests that billed party preference actually would be procompetitive because "it would focus competition in operator services towards end users." Notice, para. 19. According to the Notice:

> Billed party preference would redirect the competitive efforts of OSPs towards providing better services and lower prices to end users, as opposed to paying higher commissions.

Id.

There is a suggestion in the language quoted above that the commissions paid by operator service providers have nothing to do with "real" competition, and that commissions serve only to detract from competition by giving location owners an undeserved monopoly rent. If this is the view of the public communications market that is reflected in the Notice, it is seriously flawed.

As APCC has explained in its comments on billed party preference and other public communications issues, payphones and other "aggregator" telephones are not static fixtures which can be taken for granted as "access points" into the public switched network. Rather, payphones and "aggregator" telephones are part of the public communications marketplace, and the quantity and quality of the telephones that are made available to the public in that marketplace are directly responsive to market forces. The quantity and quality of telephones that are provided, in turn, is what largely determines whether "better services" are offered to end users. The average consumer who wants to use a payphone must resolve three basic problems before dealing with any other issues: (1) is there a payphone to be found; (2) is the payphone available, or "occupied"; and (3) does the payphone work? If even one answer to these questions is not affirmative, then the consumer may never even have the opportunity to consider such matters as price, dialing convenience, or the identity of the provider of the particular service accessed at a particular payphone.

Like it or not, compensation of payphone providers and location owners plays a key role in determining whether the answers to the consumer's three basic questions are all affirmative. If the commissions offered are adequate to motivate location owners, then they are more likely to agree to have payphones, to have enough payphones to accommodate the demand, and to exercise quality control over the payphone itself and the services offered at the payphone.[15] Similarly, if the compensation available to the payphone provider is adequate, the payphone provider is likely to do a better job of finding suitable locations for payphones, keeping the payphone maintained so that it works, and exercising quality control over the services provided at the payphone.

As a result of payphone competition, and the associated commissions, there are more payphones available where they are needed.

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[15]There is a real sense in which payphones compete for "shelf space" with other goods. The payphones value to location owners as an amenity only goes so far. In the choice between a payphone and a video game or another snack rack, the money to be earned usually controls the outcome.

By eliminating the ability of payphone providers and location owners to earn reasonable commissions from the 0+ services offered at payphones, billed party preference would take away the incentives that make the public communications marketplace work. Without the ability to earn revenue from a package of services accessed by 0+ dialing, location owners have no particular incentive to assemble and offer a package of services at their payphones. Indeed, they would have no particular incentive to have payphones at all. The marketplace would return to a system under which the quantity and quality of payphone service depend on the whim of the local telephone company.[16]

To the extent that payphone competitors survived at all, they would become even more subservient to the local telephone monopoly than they are today. Payphone owners would lose more and more control of their business, and would be required to hand over control to their principal competitors, the LECs.

B. Existing Inequities in the Payphone Market Must be Addressed

[16]Some degree of payphone competition, and some of the benefits of competition, might survive under billed party preference. However, this assumes that the level of compensation prescribed by the Commission for payphone providers, as discussed in Section IV below, would be substantially higher than the inadequate level of compensation recently prescribed for "dial-around" calls. Even with adequate compensation, the scope of payphone competition would be far more circumscribed under billed party preference, because there would be no opportunity for individual location owners and payphone providers to develop innovative service packages. A payphone market might continue to exist, but would be subject to the heavy hand of regulation.

The anticompetitive threat that billed party preference poses for the payphone market would be aggravated by the FCC's failure to take any action whatsoever on the pending petitions of industry groups seeking equalization of the cost of interconnection and other terms on which LEC and non-LEC payphones compete.[17] The Commission is proposing to require that both LEC and non-LEC payphones be uniformly compelled to route 0+ calls to the LECs' billed party preference service. However, LEC payphones and non-LEC payphones do not receive uniform regulatory treatment in other respects. LEC payphones are treated as part of the regulated interstate network and included in the LECs' interstate rate base. By contrast, non-LEC payphones are treated as CPE.

This disparity of treatment has greatly inhibited the development of full and fair competition between LEC and non-LEC

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[17] See Public Telephone Council ("PTC"), Petition for Declaratory Ruling that Bell Operating Company Pay Telephones Are Customer Premises Equipment for Regulatory Purposes, filed July 18, 1988; APCC, Petition for Declaratory Ruling That End User Common Line Access Charges May Not Be Assessed on Competitive Public Pay Telephones, filed April 21, 1989. APCC's petition has been pending for more than three years. PTC's petition has been pending for four years.

In a meeting with and followup letter to Chairman Sikes, and a Petition to Expand the Scope of Rulemaking filed shortly after release of the Notice, APCC has specifically requested that the matters raised in the above-described petitions be formally considered in conjunction with billed party preference. However, no action has been taken to date on APCC's requests.

payphones. Imposing a uniform routing convention on two classes of competitors subject to disparate regulatory regimes will exacerbate the competitive imbalance and further inhibit the emergence of true competition. The Commission must, as a phase of its examination of billed party preference, address the disparate regulatory treatment accorded LEC and non-LEC payphones at the interstate level.

The Commission must determine whether LEC and non-LEC payphones should not both be treated as CPE, i.e., given uniform regulatory treatment. Treatment of LEC payphones as CPE would result in their removal from regulated accounts. Further, LEC payphones would be unbundled from other network services. Treating both LEC and non-LEC payphones as CPE would result in a Computer III type of regulatory environment. Both LEC and non-LEC payphone providers would take all network services on a tariffed basis.

These changes in regulatory treatment are necessary to address the underlying competitive problem that billed party preference purports to address -- "excessive" commission levels -- in a manner that comports with the continued existence of a competitive payphone market. To the extent that there are "excessive" commissions being paid to location owners, the root cause can be found in the LECs' ability to provide unlimited funding of such commissions from regulated local exchange and exchange access revenues. Only by requiring to LECs' payphone operations to support themselves on a stand-alone basis, without drawing any subsidy from general revenues, can the Commission effectively eliminate the primary source of any excessive commissions.

Another reason why it is essential for the Commission to address the regulatory inequities afflicting the payphone industry in conjunction with billed party preference is that the adoption of compulsory billed party preference would greatly increase the LECs ability to subsidize its own operations and disadvantage those of independent payphone owners. As explained above, in adopting compulsory billed party preference, the Commission will have effected a fundamental shift in the competitive balance between LECs and independent providers -- in both enhanced services as well as in their capacity as payphone competitors. The LECs would acquire a new pool of revenues from which to subsidize their payphone operations at the same time that payphone owners would incur a dramatic decline in the revenues they earn from 0+ calls. The predictable result is that the LECs would recapture the payphone market. The only way to prevent this result is to terminate the LECs' ability to subsidize their payphone operations from regulated revenues.

A third reason why it is necessary to address the regulatory inequity in the payphone market in conjunction with this proceeding is that it is the only way to ensure a fair appraisal of the merits of billed party preference. To the extent the Commission depends on information submitted by the LECs to support its cost-benefit evaluation, it cannot reasonably expect an accurate and fair appraisal from that source as long as the LECs stand to regain control of the payphone marketplace through the adoption of billed party preference. Only if the LECs are forced to assess the impact of billed party preference on their own payphones in a fairly competitive local exchange environment -- where their payphones are on the same regulatory footing as non-LEC payphones -- will the Commission get the benefits of the LECs' full views on the impact of billed party preference on payphone competition.

If the Commission were to go forward with its consideration of compulsory billed party preference <u>without</u> considering any fundamental change in the regulatory inequities of the payphone market, then, in light of the violent damage to the competitive payphone market that would be certain to ensue, the fundamental issue that the FCC would have to consider is whether the continuing competitive provision of payphones is in the public interest. It would be a legal error and grounds for reversal if the Commission were to adopt compulsory billed party preference without fully considering the public interest in the survival of a competitive payphone market.

IV. INDEPENDENT PAYPHONE OWNERS MUST BE REASONABLY COMPENSATED FOR CALLS ROUTED TO BILLED PARTY PREFERENCE

If the Commission were to decide to impose a compulsory system of billed party preference on the payphone industry, then it would be necessary for the Commission to prescribe compensation for independent payphone providers for all calls routed to the billed party preference system. The reasons why such compensation is necessary are essentially the same reasons that necessitated the Commission's decision to prescribe compensation of pay telephone providers for "dial-around" access code calls. See Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736 (1991), petition for review pending ("Payphone Compensation Order").

First, as the Commission stated in its Payphone Compensation Order:

> By providing the equipment through which the consumer initiates calls to the OSP of choice, the payphone owner is benefiting the public but is not guaranteed any revenue for [billed party preference] calls.

Id., para. 34. The payphone provider must expend financial resources to maintain the equipment, and would be required to make the equipment available for billed-party-preference calls. Under these circumstances, as the Commission explained, "it is only fair" that the costs of maintaining the payphone be shared by consumers who allegedly would benefit from making billed-party-preference calls and by the OSPs who derive revenue from the calls. Id.

Indeed, there can be no reasonable dispute that, if a company undertakes the expense of installing and mainting equipment where it is available for public use, that company is entitled to charge a reasonable fee for the use of the telephone, especially when all other parties involved in a call -- including the long distance carrier that handles the call and the local exchange carrier that routes the call and provides the billed-party routing identification service -- are compensated for their respective roles in handling the call.

If independent payphone providers were not compensated for their role in handling billed-party-preference calls, then they would be forced to collect all the calls associated with operating the payphone from local and 1+ sent-paid calls. Since 1+ sent-paid calls comprise a negligible percentage of total interstate payphone calls, the burden of recovering payphone costs would be impossible because it would fall on "only a fraction" of the interstate users. In analogous proceedings involving the recovery of the costs of LECs' payphones, the Commission has made clear that it is inappropriate to impose a disproportionate share of payphone costs on "only a fraction" of interstate users. MTS and WATS Market Structure, Third Report and Order, on reconsideration, 97 FCC 2d 682, 703-05 (1983); further reconsideration, 97 FCC 2d 834 (1984); aff'd in principal part and remanded in part, NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

Further, as discussed in Section III., above, compensation is essential because otherwise, under a system of billed party preference, independent payphone competitors would not survive.

Finally, for the same reasons that it is impractical for independent payphone providers to collect compensation as an advance coin deposit from consumers who make "dial-around" calls, it is impractical to demand a coin payment from consumers who make "billed-party-preference" calls. Consumers are accustomed to the longstanding industry practice for "0-" and "0+" calls. The very purpose of these calls is to spare the consumer the inconvenience (or danger, in personal emergencies) of having to make an up-front coin payment at the payphone. Demanding an up-front coin payment from consumers on billed-party-preference calls would be confusing, disruptive, and defeat the purpose of making a "non-coin-paid" operator-assisted call. Further, as long as LECs have mechanisms other than coin payment that allow them to recover the costs of their payphones, independent payphone companies could not demand coin payment from consumers on a 0+ call without suffering fatal losses. If callers utilizing billed-party-preference were required to deposit coins when using an independent payphone but not when using a LEC payphone, there can be no question which payphone callers would overwhelmingly prefer.

For all these reasons, in the event that the Commission imposes a system of billed party preference on the public communications industry, it is essential for the Commission to prescribe reasonable compensation for the use of independent payphones to make billed-party-preference calls. Like "dial-around" compensation, this compensation should be paid by the interLATA carriers who receive traffic from the billed-party-preference system. The most appropriate method of payment would be on a usage (per call or per minute) basis.

Billing and disbursement of compensation for billed-party-preference calls should be handled by the LECs. Since the LECs must track billed party preference calls anyway in order to administer the look-up and routing functions of the system, the

LECs would already be involved in and benefitting from the system and the objections previously raised regarding LEC administration of "dial-around" compensation would not apply. Cf. Payphone Compensation Order, ¶¶ 40-41.

CONCLUSION

For the foregoing reasons, the Commission must not impose a compulsory system of billed party preference on the public communications industry.

Respectfully submitted,

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